APPENDIX

In the United States District Court, Southern District of California, Central Division

No. 22672

UNITED STATES OF AMERICA, PLAINTIFF

v.

GEORGE E. SHIBLEY, DEFENDANT

CERTIFICATE RE CONTEMPT OF GEORGE E. SHIBLEY, AN ATTORNEY

I

In conformity with Rule 42 (a), Federal Rules of Criminal Procedure, I hereby certify that the series of criminal contempts set forth below in Paragraphs IV to XIV inclusive were committed in the actual presence of the court, and were seen and heard by the court during the trial of the case of *United States of America* v. *George E. Shibley,* No. 22672, which commenced on October 20, 1953 and was tried in the United States District Court, Southern District of California, Central Division and continued to November 20th, 1953.

II

The defendant, George E. Shibley, at all times mentioned in this certificate, is an attorney at law, a member of the State Bar of California and admitted to practice in the District Court of the United States for the Southern District of California.

The case involved an Information filed by the United States Attorney against the defendant, George E. Shibley, and charged in nine counts, violations of Sec. 622, Title 50 U. S. Code. Count 3 charged a wilful neglect and refusal to appear as a witness before a Military Court of Inquiry, and the remaining counts charged refusal to answer particular questions asked of the said George E. Shibley at the hearing before the Court of Inquiry.

The government offered no proof on count 3 and no proof on counts 8 and 9, and at the close of the government's case the motion by the defendant for judgment of acquittal was granted on these counts.

The trial continued from October 20, 1953 until November 20, 1953, at which time the jury returned a verdict of acquittal of the charge in counts 1, 2 and 5. The jury failed to agree as to counts 4, 6 and 7. Except for October 22 and 23, when this trial was adjourned for the hearing of another matter, and except for November 11th and except for Mondays which were occupied by law and motion and pretrial matters, and several other minor interruptions, the trial occupied the full time of the court from October 20, 1953 to November 20, 1953 inclusive.

A motion to dismiss had previously been made, briefed, argued and overruled by another judge of this court, the Honorable Leon Yankwich, who expressly decided many of the issues in the case, and filed a written opinion, *United States* v. *Shibley,* 112 F. Supp. 734.

After the matter came before me for trial, and in the proceedings before me, I ruled repeatedly:

(1) That this court would follow Judge Yankwich's rulings, and, (2) That this court agreed with Judge Yankwich's rulings and that the matters decided by

him were binding on me and would not be re-argued or reconsidered.

At the inception of the trial before me the defendant, George E. Shibley and his attorney, Daniel G. Marshall appeared in chambers and out of the presence of the jury at the request of the defendant, and the defendant George E. Shibley then stated that he, as an attorney, desired to participate in his own defense, together with Daniel G. Marshall, his attorney. The court ruled that either the defendant George E. Shibley or the attorney, Daniel G. Marshall might try the case, but not both of them; but that if the defendant Shibley elected to act as his own attorney, the attorney Daniel G. Marshall might sit with him at the counsel table but could not address the court. The defendant George E. Shibley conferred with Daniel G. Marshall and elected to try his own case.

After the defendant Shibley undertook his own defense and because of the voluminous, wordy, rambling, repetitious and far fetched objections, contentions and motions made by Shibley acting as his own attorney, the court a day or so later advised George E. Shibley and attorney Daniel G. Marshall that the court would reconsider its ruling and would permit both George E. Shibley and Daniel G. Marshall to participate in the proceedings before the court, as attorneys. This ruling was made in the hope that such action would speed up the trial and would result in more adequate representation for the defendant.

Thereafter the defendant George E. Shibley, acting as an attorney, from time to time undertook the examination and cross-examination of witnesses, the making of motions, objections, offers of proof and argument and on other occasions the defendant George E. Shibley permitted his attorney Daniel G. Marshall to conduct the proceedings, with the result that on sev-

eral occasions the court, out of the presence of the jury advised and cautioned the defendant Shibley as follows :

(1) That Daniel G. Marshall was a competent attorney and able to conduct the defense for him;

(2) That the defendant George E. Shibley, as the party litigant, was too close to the case and too emotionally involved with it and was not adequately representing himself;

(3) That the defendant George E. Shibley was needlessly extending and multiplying the record by repetitious, voluminous, wordy, rambling objections and motions and was continually raising issues and contentions previously ruled upon, and that the results of the defendant George E. Shibley's activities were that he was creating a record of such size and length that if convicted he might be financially unable to pay for the transcribing and printing of a record on appeal. That notwithstanding such advice and caution by the court, defendant George E. Shibley continued to actively participate in the trial and to continue with objections, contentions and arguments as stated above.

That at the inception of the case the defendant George E. Shibley, acting as his own attorney, in a hearing held in chambers and out of the presence of the prospective jury, at the request of the defendant George E. Shibley, Shibley made a lengthy oral motion to dismiss based on various grounds, one of which was the failure of the Information and each and every count thereof to charge a public offense; and that said motion had subdivisions A to J. inclusive, and then proceeded with so-called additional grounds and alternate grounds; and although the court repeatedly stated to and ordered defendant George E. Shibley as an attorney to merely state his motion and not argue the matter, the alleged motion consumed several hours;

that in the case of the making of this motion and thereafter repeatedly throughout the trial after the court ruled on motions and denied the same, George E. Shibley, acting as an attorney, would then state in substance, "may I state additional grounds for the motion" or "I desire to state additional grounds for the motion" or would then remake the same or similar motion merely using different words or phrases.

That at the inception of the making the above oral motion to dismiss, the court stated that there would be incorporated by reference a motion to dismiss theretofore made by or for the defendant before Judge Yankwich and the court stated that the matters covered in the motion to dismiss before Judge Yankwich need not and would not be restated in the motion to dismiss before this court; that notwithstanding such state of the record and the orders and directions of the court to George E. Shibley acting as an attorney, many matters contained in the oral motion to dismiss were matters theretofore presented to and ruled upon by Judge Yankwich and were merely repetitious.

That thereafter on other motions made by George E. Shibley acting as an attorney, the court stated and directed that the defendant Shibley should incorporate by reference the oral motion to dismiss made in chambers and stated that for identification it might be referred to as "the motion to dismiss made in chambers at the inception of the proceedings." That thereafter and because of the rambling, repetitious, voluminous, wordy, unnecessary objections and contentions and motions made from time to time by George E. Shibley, acting as an attorney, the court suggested that the defendant prepare a written summary of the objections that might be made to questions, and suggested further that all the matters of contention and objection raised previously in (1) the

motion to dismiss before Judge Yankwich and (2) the oral motion to dismiss before this court might be called the defendant's "General Objection" and might be incorporated and referred to by the defendant as his general objection without the necessity of repeating, on each occasion, all or many of the objections of the defendant. That on or about October 27, 1953, the defendant's attorney Daniel G. Marshall prepared, served and filed with the court a document entitled, "Defendant's List of Objections to Questions to Witnesses," listing various objections consecutively by number, "which he will adopt by reference as his objections by stating the identifying number thereof." The said objections, some with various subdivisions, ran from 1 to 22 inclusive.

That notwithstanding the statement and order of the court that George E. Shibley, acting as attorney, should incorporate by reference his matters of objection contained in the motion to dismiss before Judge Yankwich, the oral motion to dismiss at the inception of the trial before this court and the filing of the written list of objections, George E. Shibley while acting as an attorney continuously and repeatedly made long, voluminous, detailed, repetitious, wordy and unnecessary motions, objections and offers of proof containing many of the matters previously contained in the said motions to dismiss theretofore referred to; and George E. Shibley, acting as an attorney, would occasionally on his own accord, and occasionally at the suggestion of the court, incorporate by reference the matters theretofore referred to, and then would proceed to specify the same material or much of the same material over again in the present objection or motion.

That it is significant that the proceedings before the Military Court of Inquiry, which led to the filing

of the Information in this court, show similar conduct by George E. Shibley and in that proceeding George E. Shibley as a witness claimed and stated certain privileges of a witness and certain alleged privileges of a witness; that after he would conclude such statement before the Court of Inquiry and after the Court of Inquiry would rule denying his claim of privilege, George E. Shibley would then state in substance, "may I state additional privileges of a witness" and then proceed to state most of the same privileges previously claimed and occasionally additional alleged claims of privilege. That this course of conduct was carried on by George E. Shibley throughout the proceedings before the Military Court of Inquiry. That a similar type of proceeding and conduct was carried out by George E. Shibley acting as attorney before this court.

That because of the rambling, wordy, voluminous, repetitious and unnecessary objections and contentions and motions made in this court by George E. Shibley, acting as an attorney, the court suggested and required in connection with a motion to strike made by George E. Shibley, acting as an attorney that George E. Shibley make a written motion to strike incorporating his objections and contentions and a written motion for judgment of acquittal for use at the close of the government's case. That attorney Daniel G. Marshall thereafter prepared, served and filed on November 3, "Defendant's Motion to Strike Testimony and Exhibits" and on the same date, "Motion for Judgment of Acquittal," the motion to strike consisting of four pages and the motion for judgment of acquittal consisting of eight pages with 28 divisions and numerous subdivisions; that although the said written motions were preferable to the oral proceedings engaged in by George E.

Shibley appearing as an attorney, they likewise were repetitious and included numerous of the objections previously made in the motions to dismiss before Judge Yankwich and before this court. Thereafter other motions and objections were made from time to time by George E. Shibley acting as an attorney, covering matters previously ruled on by Judge Yankwich and by this court. That by such conduct George E. Shibley acting as an attorney intentionally, deliberately, contemptuously and without justification or reason, in bad faith delayed and impeded this trial and interfered with the administration of justice, with the result that the trial consumed approximately 17 trial days, when it could otherwise have been tried in not exceeding 4 to 6 days.

III

That the acts done, the statements made and the conduct engaged in by George E. Shibley as an attorney, in paragraphs IV to XIV inclusive set forth hereafter, were done, said and engaged in by the said George E. Shibley as an attorney, intentionally, deliberately, contempuously, without justification and in bad faith and were made and done and engaged in by George E. Shibley as an attorney, for the purpose of impeding, hindering, obstructing and delaying the progress of the trial, for the purpose of interfering with the administration of justice, for the purpose of harassing the court, and for the purpose of showing and expressing the contempt of George E. Shibley for this court and for the judicial process, and were in violation of the oath and duties of George E. Shibley as an attorney and as a member of the bar of this court.

This paragraph No. III is incorporated by reference in and made a part of each of paragraphs IV to XIV inclusive of this certificate.

IV

The matter in paragraphs I and II are incorporated by reference.

Day by day throughout the trial, on occasions too numerous to specify, George E. Shibley acting as an attorney, in the presence of the court:

(1) Made motions and objections concerning issues and matters which had been theretofore ruled on and decided by this court in the case, and such renewal of the motions and objections were not necessary or proper for the preservation of the point in the record;

(2) Repeated motions and objections after the court had advised and cautioned him that the court had theretofore ruled on the same matters in the case;

(3) Made repetitious, unnecessary and improper offers of proof;

(4) Impeded, obstructed, hindered and delayed the trial by such conduct;

(5) Interfered with administration of justice by such conduct.

That an inspection of the entire record is necessary in order to see the nature and extent of such conduct.

V

On October 29, 1953, Lt. Col. Anderson was examined as a witness. Attorney Daniel G. Marshall had been excused that day to attend other business and George E. Shibley, as an attorney, was conducting the defense.

Cross-examination of Lt. Col. Anderson was started at 4:10 PM by George E. Shibley acting as an

attorney. The examination in chief had been very brief and limited to only one or two matters.

Thereupon George E. Shibley, acting as an attorney, in the presence of the court, began a course of conduct aimed at delaying and impeding the trial. He looked back at the clock in the rear of the courtroom on various occasions; he asked questions, withdrew questions, asked questions to be re-read, asked questions to which objections were sustained on the ground they were outside the scope of direct examination, and made long and wordy speeches and arguments, and although ordered repeatedly by the court to proceed and complete the cross-examination, he continued such delaying tactics. The court advised him the cross-examination of the witness would be completed that session even if the court continued beyond 4:30 PM.

At about 4:30 PM he stated he was "inadequate" to proceed longer and engaged in an emotional scene before the jury, and the court adjourned for the day.

VI

At the end of a trial day on an occasion when the court was about to convene in chambers, out of the presence of the jury for the purpose of discussing instructions, the court, while still in session in the court room, stated its intention to adjourn to chambers for the purpose above, and George E. Shibley, acting as an attorney, stated that he would be absent but that his attorney Daniel G. Marshall would attend and thereupon George E. Shibley left the court room.

That thereafter the court stated to certain officers of the U. S. Marine Corps who were present in the court room, that since they were lawyers they might desire to attend the session in chambers to observe the discussion and settlement of instructions and in-

formed them they might if they desired, attend the session in chambers. Certain of them did then attend the session in chambers as observers.

Thereafter during a subsequent session of the court, in the presence of the court, George E. Shibley, acting as an attorney, accused the court of misconduct in inviting the said officers of the U. S. Marine Corps into the session in chambers but of not inviting his friends and secretary into the session in chambers.

VII

On November 18, 1953, during the trial and in the presence of the court, George E. Shibley, acting as an attorney, said and did the following; "Your Honor did not intervene to protect me in that respect," inferring that the court had intervened to protect the prosecution, when in fact the court had in the instance referred to, interrupted Mr. Deutz, the Assistant U. S. Attorney because of statements made in his argument; and thereafter accused the court of "intervening continually it seems to protect the prosecution;" and thereafter accused the court of "constant interference with the defense in aid of the prosecution, and constant failure to protect the defendant in this case."

VIII

On November 18, 1953, in the presence of the court, George E. Shibley, acting as an attorney, accused the court of "indicating a serious bias and prejudice against me (Shibley) and a serious bias and prejudice in helping Mr. Deutz" the Assistant U. S. Attorney.

IX

That George E. Shibley during the trial and in the presence of the court, acting as an attorney, requested

frequent recesses and in particular on November 18, 1953, requested a recess at ten minutes to three PM and again at ten minutes after three PM and the following occurred:

The COURT. Bring the jury down.

Mr. SHIBLEY. Before the jury comes down, Your Honor, I would appreciate a five-minute recess.

The COURT. You just had a recess.

Mr. SHIBLEY. It wasn't a recess, as far as I was concerned, Your Honor. This matter does involve me, and—it isn't unnatural——

The COURT. How often do we have to have a recess?

Mr. SHIBLEY. Five minutes would be adequate.

The COURT. We gave you a recess at approximately ten minute to three. It is now ten minutes after three. Do you want a recess every twenty minutes?

Mr. SHIBLEY. Your Honor, I did not have a recess. I happened to run out of the court room in the bathroom. Should I keep describing what I did? I relieved myself, I turned around and came back. I don't think I was out of this room for more than two minutes and thirty seconds, and it was not what I call a recess.

X

Prior to and during the argument of this case to the jury on November 18, 1953, the court instructed George E. Shibley that there was no issue in the case as to the truth or falsity of certain charges he had previously made against certain officers of the U. S. Marine Corps, and directed and ordered George E. Shibley that he should not and would not be permitted to argue that issue.

That thereafter on November 18, 1953, in the presence of the court, George E. Shibley, acting as an attorney, continuously and repeatedly argued that par-

ticular issue to the jury even though repeatedly ordered and warned by the court not to argue that issue.

XI

On November 19, 1953, during said trial and in the presence of the court, George E. Shibley, acting as an attorney, during a session on objections to instructions given, stated,

> * * * as I heard you, your Honor, it seemed to me that when you came to line 9 where the instruction says, "if the accused be guilty, say so," that you said in a very loud, determined voice, which I wrote down under my notes at the time, "fairly shouted," although that is probably an exaggeration. I did not notice similar emphasis or loudness, your Honor, as to the next sentence, "if not proved guilty, say so."
>
> The COURT. Mr. Shibley, the record will show that I tried to state those two alternatives with equal emphasis. Your exception is overruled on that ground.

The instructions given, from written instructions on file in this case, contained general instructions that the court had not intended to comment on the evidence and that the jury was the sole judge of the facts and that although the court had asked questions of witnesses, the jury was not to assume that the court held any opinion as to the matters to which the questions related.

XII

On November 20, 1953, during the trial of this action and in the presence of the court, George E. Shibley acting as an attorney, pursued the course of conduct heretofore referred to in paragraphs II and IV of this certificate and made objections and took

exceptions and after the court had ruled, would state; "and we object further, your Honor, on the grounds * * *" etc. and in words of such substance and effect.

XIII

On November 20, 1953, during the trial and in the presence of the court, but in the absence of the jury, George E. Shibley acting as an attorney, immediately following the matters referred to in paragraph No. XII above, engaged in the following colloquy with the court and stated the matters and things hereafter set forth:

The COURT. Just a moment. Mr. Shibley's objections and requests are denied. And you have had about three or four of them, and that is all, Mr. Shibley.

Before the Court of Inquiry, after taking up minutes of time and repeating statements of privilege, you would always end up and say, "May I state further privileges," and then it would go on again for a long time, and then you would wind up, the court would rule, and then you would say, "May I state further privileges?" Now you have had about three or four bites at the apple. That is it.

Mr. SHIBLEY. I object to your Honor's manner of speaking to me at this time, in an angry tone of voice, looking at me in what appears to be a malevolent and angry way, and I assign it as prejudicial error and misconduct.

The COURT. I consider you contemptuous of this court, and we will take that matter up later.

XIV

On November 20, 1953, during the trial and in the presence of the court, George E. Shibley acting as an

attorney assigned as error the fact that Laughlin E. Waters, the United States Attorney and Edward Skelly, Assistant U. S. Attorney, took their place at the counsel table, and George E. Shibley acting as an attorney then stated that this was done by Waters and Skelly "to further impress or put pressure upon this jury to find some sort of verdict against the defendant."

XV

RE AFFIDAVIT OF PREJUDICE

After the verdict of the jury on November 20, 1953, the matter of the summary contempt of George E. Shibley was continued to November 23, 1953, together with motions to dismiss the remaining counts of the information and the matter of resetting for trial.

On November 23, 1953, portions of the transcript were not ready and the court stated it would not retry the remaining counts of the information and the matter would have to be tried by another judge, and the matters were continued to Monday, December 7, 1953.

On December 7, 1953, portions of the transcript were not ready and George E. Shibley was scheduled to go to trial the following day before Judge Harrison on another charge.

On December 7, 1953, George E. Shibley through his attorney, Daniel G. Marshall, filed an affidavit of personal bias and prejudice against me. The court thereupon transferred to the court of the judge handling the criminal calendar, all matters concerning this case except the matter of summary contempt against George E. Shibley and continued the summary contempt matter of December 28, 1953.

The court now rules that George E. Shibley may not utilize an affidavit of bias and prejudice or require this court to pass upon it, or to disqualify itself and thereby prevent the filing of a certificate of contempt against George E. Shibley as an attorney and prevent this court from holding George E. Shibley in summary contempt. To permit the filing and subsequent operation of an affidavit of personal bias and prejudice, after a court had stated it would consider and act upon a matter of summary contempt to so operate as to prevent the judge from proceeding with a matter of summary contempt, would prevent a judge from upholding the dignity of the proceedings in his court, and from carrying out a proper administration of justice.

XVI

On the basis of the matters contained in paragraphs I to XIV inclusive, the court holds George E. Shibley, an attorney at law, and a member of the bar of this court, in summary contempt of this court.

Dated: December 28, 1953.

(S) JAMES M. CARTER,
U. S. District Judge.

U. S. GOVERNMENT PRINTING OFFICE: 1956

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IN THE

Supreme Court of the United States

October Term, 1956
No. 322

GEORGE E. SHIBLEY,

Petitioner,

vs.

UNITED STATES OF AMERICA.

Petition for Rehearing of Order Denying Petition for Writ of Certiorari.

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IN THE

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October Term, 1956
No. 322

GEORGE E. SHIBLEY,

Petitioner,

vs.

UNITED STATES OF AMERICA.

Petition for Rehearing of Order Denying Petition for Writ of Certiorari.

Petitioner prays that this Court grant rehearing of its order of October 15, 1956, denying the petition for a writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit in the above entitled case as prayed for in the petition filed August 15, 1956, herein.

Reasons for Granting Rehearing and Issuing the Writ.

1. At the time of the filing of the petition for a writ of certiorari, the case herein appeared governed by the decision of this Court in *Offutt v. United States*, 348 U. S. 11. It was therefore urged, among other things, that the trial judge was not qualified to conduct the summary contempt proceedings against this petitioner under *Offutt* and that the Court below erred in remanding the case to the same trial judge for reconsideration of sen-

tence (Pet. pp. 20-23). There was, however, another substantial ground available to petitioner in support of the petition for a writ of certiorari which was not presented in the said petition relative to the disqualification of the trial judge.

2. Prior to the contempt proceedings of January 18, 1954 [R. 2587],[1] and on December 7, 1954, counsel for petitioner submitted an affidavit of bias and prejudice, requesting the trial judge to disqualify himself and assign the matter to another judge [C. Tr. 642-57; R. 2580].[2] The affidavit was filed pursuant to the provisions of 28 U. S. C. 144 (June 25, 1948, c. 646, 62 Stat. 898, as amended May 25, 1949, C. 139, Sec. 65, 63 Stat. 99) and in compliance therewith [C. Tr. 642, 657].[3] The Affidavit alleged petitioner's belief that the trial judge had a personal bias or prejudice against petitioner [C. Tr. 643], and then sets forth the facts and reasons for the said belief [C. Tr. 643-57]. The affidavit sets forth the overt manifestations of disappointment expressed by the trial judge when the jury acquitted petitioner of the charges made against him [C. Tr. 643-45]; the denunciation of the petitioner by the trial court before the jury

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[1]The reference "R" is to the Reporter's Transcript of Proceedings.

[2]The reference "C. Tr." is to the Clerk's Transcript of Record.

[3]The statute reads as follows: "When ever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

"The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

[C. Tr. 645-48]; the personal hostility of the trial judge to petitioner demonstrated throughout the trial and manifested by aspersions upon petitioner's character as a lawyer and as a man [C. Tr. 650-52], and the patent bias and prejudice of the trial judge against the petitioner and in favor of the prosecutor [C. Tr. 652-53]. Although the affidavit of bias and prejudice was duly filed under the governing statute, and although the jurisdiction of the Court to proceed further was brought timely to the Court's attention, the trial judge refused to disqualify himself [C. Tr. 683-84].

3. A substantial question of jurisdiction and construction of the applicable statute is therefore available which has not been previously presented to this Court. The question reads as follows:

> Whether petitioner was deprived of his liberty without due process of law when, upon the filing of the affidavit of bias and prejudice under 28 U. S. C. 144, the trial judge ruled that he had the right and power to preside as judge at the subsequent summary contempt proceedings and impose a sentence of imprisonment upon petitioner.

4. The purpose of 28 U. S. C. 144 is plainly to secure for all litigants a fair and impartial hearing before a tribunal completely divested of any personal bias or prejudice, and the statute makes it the duty of all Courts to scrupulously adhere to the provisions of the law and to guard against any appearance of injustice. It has therefore been held that when an affidavit of bias and prejudice is filed, the truth of all of the allegations of fact contained therein is admitted and it becomes the duty of the Court to determine only its legal sufficiency, and if the affidavit

meets the requirements of the statute and is accompanied by a certificate of the counsel of record, the presiding judge can proceed no further but is disqualified. *Berger v. United States,* 255 U. S. 22; *Korer v. Hoffman,* 212 F. 2d 211, 212 (C. A. 7, 1954); *Gladstein v. McLaughlin,* 230 F. 2d 762 (C. A. 9, 1955).

The aforesaid principles are equally applicable here. The affidavit of bias and prejudice submitted by petitioner was clearly sufficient in law.

> "But bias must be considered objectively. Few, if any, judges would make the reported remarks, in the course of a trial, unless they had developed definite and positive hostility to plaintiff and his case. Hostility is a form of bias."
>
> *Whitaker v. McLean,* 118 F. 2d 596 (C. A. D. C., 1941).

Affidavits of bias and prejudice are properly submitted in contempt proceedings, and when an attorney is involved call for scrupulous observance of the federal statute applicable thereto.

> "Guilt in a criminal contempt must be established beyond a reasonable doubt. . . . Once established, the penalty of such a judgment against an attorney is long-lived. It does not cease with the payment of a fine or with the discharge of a jail sentence, but, being inherent in the judgment, may arise to confront him throughout his professional career."
>
> *Schmidt v. United States,* 115 F. 2d 394, 398 (C. A. 6, 1940).

It is submitted, therefore, that the trial judge was without power to proceed in the proceedings after the filing of the affidavit of bias and prejudice by petitioner, and

that the purported exercise of jurisdiction thereafter was invalid, and resulted and will result in deprivation of petitioner's liberty without due process of law. The question herein presented should be reviewed by this Court. In *Berger v. United States,* 255 U. S. 22, this Court affirmed that the purpose of the statute is

> "that the tribunals of the country shall not only be impartial in the controversies submitted to them but shall give assurance that they are impartial, free, to use the words of the section, from any 'bias or prejudice' that might disturb the normal course of impartial judgment" (pp. 35-36).

This Court added an admonition which, it is submitted, has not been followed in the case herein:

> "And in this there is no serious detriment to the administration of justice nor inconvenience worthy of mention, for what concern is it to a judge to preside in a particular case; of what concern to other parties to have him so preside?" (p. 35).

Conclusion.

For the reasons set forth above, it is respectfully urged that rehearing be granted and that, upon such rehearing a writ of certiorari issue to the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

A. L. WIRIN,
SAM ROSENWEIN,
DANIEL G. MARSHALL,
Attorneys for Petitioner.

GEORGE CHULA,
JAMES MONROE,
PHILIP E. POPPLER,
Of Counsel.

Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58(2) of the rules of this Court.

DANIEL G. MARSHALL
Counsel for Petitioner.